IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	No. 01-20251-(G)Ml
LAKINA S. COOK,	)	
Defendant.	)	

ORDER DENYING MOTION FOR IMMEDIATE STAY OF BUREAU OF PRISONS' RE-CLASSIFICATION

On March 4, 2003, defendant Lakina S. Cook, Bureau of Prisons ("BOP") registration number 17996-076, an inmate at the Federal Correctional Institution at Greenville, Illinois, through counsel, filed a motion styled, "Motion for Immediate Stay of Bureau of Prisons' Re-Classification." The Government filed a response in opposition to that motion on March 7, 2003.

On October 10, 2001, pursuant to a written plea agreement, Cook appeared before the Honorable Julia Smith Gibbons to enter a guilty plea to a criminal information charging her with one count of conspiracy to commit mail fraud, wire fraud, and bank fraud, in violation of 18 U.S.C. § 371.[1] The information and plea

[1] At the change of plea hearing, Judge Gibbons advised Cook of the five-year statutory maximum, 10/12/01 Tr. at 14, and that the sentencing recommendations are not binding on the Court, id. at 17. Judge Gibbons also confirmed that nobody had made any promises or predictions of what her sentence would be. Id. at 20.

agreement arose out of Cook's integral role in a real-estate "flipping" scheme in Memphis. Cook was a mortgage broker who prepared fraudulent leases to enable co-conspirators to obtain mortgages that were under-collateralized. Cook also personally participated in three "flip" transactions. The plea agreement provided, in relevant part, that if Cook qualified for acceptance of responsibility and fulfilled her obligations under the agreement, the Government would file a motion for a downward departure, pursuant to § 5K1.1 of the United States Sentencing Guidelines, and would recommend a sentence of imprisonment not to exceed twenty-two (22) months on the understanding that defense counsel was not precluded from seeking a lower sentence.

Judge Gibbons conducted a sentencing hearing on March 15, 2002, at which time Cook was sentenced to fourteen (14) months imprisonment, to be followed by a three-year period of supervised release.[2] Judge Gibbons also imposed restitution in the amount of

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[2] The guidelines called for a sentencing range from 33 to 41 months. In that regard, Cook received a two-point enhancement for her role in the offense. The probation officer also noted as follows:

> There is a good argument that this offense would qualify for a two point enhancement for sophisticated means as defined in the guidelines as "especially complex or especially intricate offense conduct pertaining to the execution or concealment of the offense." This offense involved many participants, each of whom were necessary to the execution of the scheme. However, the scheme was so blatant to arouse suspicion of any lay person who read the real estate transactions in the Sunday edition of *The Commercial Appeal*. Therefore, the probation officer does not believe that the enhancement for sophisticated means is appropriate.

Judge Gibbons granted the § 5K1.1 motion and sentenced Cook below the 22 months specified in the plea agreement because, subsequent to the change of plea hearing, Cook offered additional cooperation. 03/15/02 Tr. at 10, 13, 16-19, 23-24, 26-27. Cook had argued strenuously for a sentence of probation. Id. at 10, 11, 24; see also id. at 28-29 (rejecting defense request for home detention).

$574,496.61. Judge Gibbons also granted Cook's request for a recommendation that she be assigned to a boot camp, id. at 27-28, 29-30, notwithstanding the fact that she was not typical of the individuals who would benefit from that placement, in order to permit Cook the benefit of a potential reduction in her sentence of up to six months. See BOP Program Statement 5390.08, at ¶¶ 3(c), 12 (Nov. 4, 1999). Judgment was entered on March 29, 2002.

Thereafter, on April 1, 2002, Cook filed a motion seeking leave to file a late position paper concerning the amount of loss attributable to her, which was styled as a motion pursuant to Fed. R. Crim. P. 35.[3] The Government filed a response in opposition to that motion on April 4, 2002. Judge Gibbons conducted a hearing on that motion on April 11, 2002, at which time she explained at length the potentially adverse consequences to Cook should she grant the motion to reopen the sentencing hearing:

> I have no authority to go back and alter this sentence, Ms. Cook. But if I did and if we reopened your sentencing, and if we had a hearing, you are in a position where, you know, the relevant conduct and the loss in this case was determined based on the statement you made to FBI agents. Now you are apparently taking a different position. When that happens in the course of a sentencing, it often means that the defendant ends up losing points for acceptance of responsibility, because denying relevant conduct falsely is inconsistent with acceptance of responsibility. If the defendant testifies falsely about the situation, or inconsistently, or in some other was does things that can constitute obstruction of justice, then you can end up being enhanced for obstruction of justice. It is not in your interest to change your position in the course of the pendency of your criminal matter. So if we went back and reopened this up along the lines that Mr. Ballin has

[3] Cook was sentenced on the basis of losses in the amount of $2,981,603.30.

> suggested, you could end up in a situation where your guidelines were much higher than they were before. You could even lose the benefit of your 5K1 motion because you have—I don't recall whether, you know, it is outlined in this case in the plea agreement precisely under what circumstances it would be made, but ordinarily the government makes a 5K1 motion only when the person has consistently been cooperative and consistent and truthful in their story about what happened.
>
> So, you know, you could even lose the benefit of your 5K1. So you could end up in a much higher guideline range and with no 5K1 motion.

04/11/02 Tr. at 6-7. Cook was also put on notice that, if the Government were required to prove the amount of loss, the total loss could well exceed the figure used in the presentence report. Id. at 7-8.[4] On April 30, 2002, Judge Gibbons issued a written order denying the motion to file a late position paper.

In the meantime, on April 22, 2002, Cook filed a motion asking the Court to recommend that she be confined in Greenville, Illinois in order to facilitate visits by her family.[5] On May 6, 2002, an amended criminal judgment was entered that contained a recommendation that Cook serve her sentence in Greenville.

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[4] Judge Gibbons also stressed to Cook the extraordinary benefit she had derived from the plea agreement and the § 5K1.1 motion:

> I mean, that is just an extraordinary 5K1 motion. Typically when a 5K1 motion is made—and there is no typical situation because it is an individual thing. But it is not unusual for people to receive a twenty five percent reduction in sentence or a thirty three percent reduction. Fifty percent is considered pretty extraordinary. You got more off of your sentence that what is pretty extraordinary. I mean, it may not feel like you came out of this situation well, but you came out very well.

Id. at 10-11.

[5] By filing this motion, Cook essentially withdrew her request to be sentenced to a boot camp.

Cook had filed a timely notice of appeal, and new counsel had been appointed to represent her. Cook was also allowed to remain on bond until her surrender date of August 19, 2002. Then, on August 5, 2002, Cook filed a motion to vacate her sentence pursuant to 28 U.S.C. § 2255 or, in the alternative, to stay her imprisonment pending direct appeal, pursuant to 18 U.S.C. § 3143. The Government responded to that motion on August 9, 2002. On October 31, 2002, Judge Gibbons denied the § 2255 motion on the basis of Capaldi v. Pontesso, 135 F.3d 1122, 1124 (6th Cir. 1998). In explaining her denial of the motion for release pending appeal, Judge Gibbons stated that Cook's appeal "raises no substantial question of law and is solely for the purpose of delaying her sentence." 10/31/02 Order at 2.[6] The Sixth Circuit issued an order affirming Cook's sentence on January 31, 2003. United States v. Cook, 55 Fed. Appx. 341 (6th Cir. Jan. 31, 2003).

On March 4, 2003, Cook, through counsel, filed her most recent motion, which asks the Court to order the BOP "to stay its new supervised release plan requiring her [to] remain in the Federal Prison Camp, in Greenville, Illinois until July 18, 2003 and reinstate the supervised release plan of September 22, 2002 providing for her transfer to the Memphis Community Service Center on February 26, 2003. Cook contends that, in foregoing boot camp

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[6] In that regard, Judge Gibbons also stated that, "[b]ased on the history of this case, the court believes that Ms. Cook simply cannot accept that her criminal conduct will require her to serve a prison sentence." Id.

Cook had previously, on August 16, 2002, filed a motion to extend her surrender date, which Judge Gibbons denied on August 20, 2002.

and requesting that she serve her sentence in the Greenville facility, Cook relied on a previous BOP policy that would have considered her for placement in a halfway house after six months.[7]

Cook cites no authority for the proposition that this Court has any authority to grant the relief she seeks. As a preliminary matter, because "the issues raised more accurately challenge[] the execution of the sentence than its imposition," Wright v. United States Bd. of Parole, 557 F.2d 74, 78 (6th Cir. 1977), the proper vehicle for raising such a motion is a petition pursuant to 28 U.S.C. § 2241. See United States v. Jalili, 925 F.2d 889, 893-94 (6th Cir. 1991) (prisoner's motion challenging place of imprisonment could not be brought pursuant to 28 U.S.C. § 2255 but, rather, must be brought pursuant to 28 U.S.C. § 2241). The Court declines to construe the defendant's motion as a habeas petition for several reasons. First, the Western District of Tennessee would not be the proper venue for a § 2241 petition filed by Cook. As the Sixth Circuit held, "[t]he habeas corpus power of federal courts over prisoners in federal custody has been confined by Congress through 28 U.S.C. § 2241 to those district courts within whose territorial jurisdiction the custodian is located." Wright, 557 F.2d at 77; see also United States v. Griffith, No. 95-1748, 1996 WL 316504, at *2 (6th Cir. June 10, 1996) (to the extent prisoner's filing is construed as § 2241 petition, "the Eastern District of Michigan is not the proper venue to file a § 2241

[7] Although Cook cites BOP Program Statement 7310.04 (Dec. 16, 1998) as authority for that previous policy, the Court has been unable to locate any written statement of policy to that effect.

motion for one incarcerated in Lompoc, California"). Cook is confined in Greenville, Illinois. Greenville is in Bond County, which is in the Southern District of Illinois. 28 U.S.C. § 93(c). Because the relief sought by Cook can only be raised in a habeas petition, and only in a district other than this one, Cook's motion is subject to dismissal for want of jurisdiction.

Moreover, the Sentencing Reform Act of 1984 places strict limits on a court's power to modify a judgment imposing sentence. Fed. R. Crim. P. 35(c) permits correction of technical errors in a sentence, but only if the court acts within seven (7) days of the entry of judgment. Although Fed. R. Crim. P. 36 contains no time limitation, it permits only correction of clerical mistakes in judgments. Moreover, 18 U.S.C. § 3582(c), the only statute that authorizes a federal judge to modify a sentence because of a change in circumstances, is inapplicable here.

Pursuant to 18 U.S.C. § 3621, persons convicted of federal crimes are committed to the custody of the BOP. That section vests the BOP with the discretion to assign prisoners to particular prisons or programs. It does not create any right to amend or modify the judgment under which a prisoner is sentenced. See United States v. Serafini, 233 F.3d 758, 779 n.23 (3d Cir. 2000) ("[A] district court has no power to dictate or impose any place of confinement for the imprisonment portion of the sentence. Rather, the power to determine the location of imprisonment rests with the Bureau of Prisons.") (emphasis in original); Jalili, 925 F.2d at 893 (sentencing recommendation designating place of

confinement is "mere surplusage"); Brown-Bey v. United States, 720 F.2d 467, 470 (7th Cir. 1983) (interpreting § 3621(b)'s language "[t]he Bureau may designate any available . . . facility" for a prisoner's confinement as not creating any statutory right to assignment to a particular prison or to transfer between prisons); Lyons v. Clark, 694 F. Supp. 184, 187 (E.D. Va. 1988)(same); cf. Lopez v. Davis, 531 U.S. 230, 238-44 (2001) (interpreting 18 U.S.C. § 3621(e)(2)(B) broadly to permit the BOP to exercise its discretion on a categorical or case-by-case basis).

Similarly, 18 U.S.C. § 3624(c), permitting the BOP to release a prisoner to a community corrections facility before a mandatory release date, has been interpreted as vesting discretion in the BOP, not creating a right to such release. Prows v. Federal Bureau of Prisons, 981 F.2d 466, 469 (10th Cir. 1992); United States v. Laughlin, 933 F.2d 786, 789 (9th Cir. 1991). Neither statute authorizes the relief requested.

Indeed, as the Government notes, the recent change in BOP policy was fully consistent with § 3624(c), which provides in relevant part as follows:

> The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 percentum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community. (Emphasis added)

As the Government points out, "[w]hile § 3624(c) clearly allows the BOP to transfer prisoners to halfway houses, the plain language is clear that such transfers are not to exceed the lesser of the last

ten percent of the sentence imposed, or six months." G. Br. at 3 (emphasis in original). Accordingly, since Cook was sentenced to fourteen months imprisonment, the statute authorizes her transfer to a halfway house only after she serves ninety percent of her sentence. See id.[8]

The Government has attached to its response two documents explaining the BOP's policy change. The change was apparently prompted by a December 16, 2002 memorandum by a Deputy Attorney General to the Director of the BOP, which noted that the prior BOP practice of placing low-risk, non-violent offenders in community corrections centers, rather than traditional prisons, was inconsistent with the plain language of § 3624(c) and potentially resulted in a "potentially disproportionate, and inappropriately favorable, impact on so-called 'white-collar' criminals." Id., Ex. 2, at p. 2. As a result, the Director of the BOP issued a memorandum to federal judges, dated December 20, 2002, stating that, effective immediately, "[t]he Bureau will not use [community correction centers] as a substitute for imprisonment." Id., Ex. 1. Because Cook had more than one hundred fifty (150) days remaining on her sentence, her prospective assignment to a halfway house was modified. This change is fully consistent with § 3624(c).

Although Cook attempts to argue that this retroactive change in BOP policy violates her constitutional rights, this claim is entirely lacking in substantive merit. Absent "atypical and

[8] According to the Government's calculations, the statute authorizes a halfway house placement for approximately the final forty-two days of her sentence.

significant hardship," a change in the conditions of a prisoner's confinement does not inflict a cognizable injury that merits constitutional protection. Sandin v. Conner, 515 U.S. 472, 484-86 (1995). As the Supreme Court explained:

> It is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence. The phrase "administrative segregation," as used by the state authorities here, appears to be something of a catchall: it may be used to protect the prisoner's safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer. . . . Accordingly, administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration.

Hewitt v. Helms, 459 U.S. 460 (1983); see also Meachum v. Fano, 427 U.S. 215 (1976) (no liberty interest is implicated when prisoner is transferred to a more restrictive prison); Ward v. Dyke, 58 F.3d 271 (6th Cir. 1995); Newell v. Brown, 981 F.2d 880, 883 (6th Cir. 1992) (security reclassification and transfer to a higher security prison). In this case, the criminal judgment imposed a fourteen-month sentence. The fact that Cook may be spending somewhat more time than she anticipated in a traditional prison does not implicate any due process or liberty interest.

This Court lacks jurisdiction to grant the relief sought in Cook's motion, and the motion is, therefore, DENIED.

As no reasonable jurist could disagree that this Court is without jurisdiction to order to BOP to place Cook in a community corrections center, it is CERTIFIED, pursuant to Fed. R. App.

24(a), that any appeal in this matter by defendant, proceeding in forma pauperis, is not taken in good faith.

IT IS SO ORDERED this _____ day of March, 2003.

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JON PHIPPS McCALLA
UNITED STATES DISTRICT JUDGE